Utah Ethics Opinions

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132. USB EAOC Opinion No. 132

Utah State Bar

Ethics Advisory Opinion Committee

Opinion No. 132

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Issues: May an attorney who is leaving a law firm take, either to another law firm or to solo practice, the files and clients generated while the attorney was an employee or member of the law firm?

What duties does the departing attorney owe the law firm with respect to fees paid to the attorney by these clients for services performed subsequent to the attorney's departure from the firm?

Opinion: When an attorney who is an employee or member of a law firm leaves the firm, he may take with him a client and the relevant legal files generated while at the firm, but only with the prior authorization of the client.

The departing lawyer has no duty to the departed law firm with respect to fees for services rendered after the withdrawal from the firm, unless the departing lawyer and his law firm have agreed otherwise. Any such fee arrangement must comply with Rules of Professional Conduct 1.5 and 5.6 and should not effectively deny the client a choice of counsel.

Factual Background: Attorney voluntarily leaves Law Firm where Attorney is a shareholder. On departure Attorney takes client files relating to the trust and probate matters Attorney has worked on while employed by Law Firm. Attorney's name, but not that of Law Firm, appears in several prominent places on the wills, trusts and related documents contained in these files. The clients paid the fees generated by the preparation of these documents directly to Law Firm and not to Attorney. In many cases, the principal financial reward in a trust and probate practice is not in preparing the wills and trusts, but when the wills are probated or the trusts mature, which may occur long after execution of the original documents.

Analysis:

I. Client Representation and Files

It is the client, and not the departing or remaining lawyers, who determines who will be its counsel and who may keep the files. If the client wishes to terminate the law firm as its legal counsel on such files and retain the departing attorney, the client is free to do so. Rule 1.14(a)(3) mandates the law firm's withdrawal from representation if discharged by the client. (fn1)

Because it is the client who has the authority to choose counsel, an agreement between a departing lawyer and the former firm as to the future representation of a client, absent the client's agreement, is void and unenforceable. (fn2) Wolfram, in his book *Modern Legal Ethics* , has perhaps best articulated this concept, stating: "Attempting to resolve the issue by referring to clients as 'files' and debating which client each lawyer 'owns,' or to which lawyer a client 'belongs,' obscures and distorts the client-lawyer relationship. The compelling fact is that the client-lawyer relationship is personal; clients should accordingly have a first choice of counsel." (fn3)

Under the facts of this inquiry, the law firm has a duty to preserve the clients' wills and trusts until directed by the clients to deliver the files to the departing attorney. (fn4) Upon direction by the client, the law firm has a duty to surrender the papers to which the client is entitled to the departing lawyer, (fn5) unless the law firm is owed fees on such files, and applicable law accords the law firm a retaining lien. (fn6) The papers to which the client is entitled would clearly include the original wills and trusts, other documents executed by the client and such other portions of the client's file necessary to interpret or understand such documents. (fn7) During the period of time before receiving the client's direction as to who will handle a file after a lawyer's departure, neither a law firm nor the departing lawyer should deny the other access to information about the matter that is necessary to protect the client's interests. (fn8)

Further, Utah Rules of Professional Conduct 7.3(a), which limits certain in-person solicitation contacts, specifically does not apply to the solicitation of "professional employment from a prospective client with whom the lawyer has [had a] . . . prior professional relationship . . . ." The American Bar Association has issued informal opinions, under the Model Rules of Professional Conduct, indicating that a partner or associate resigning from a firm may send personal letters to clients for whose matter the attorney was directly responsible, informing them of the change to another firm. (fn9)

The ethical and legal considerations involved in the timing, form and content of such contact by the departing attorney or law firm are not addressed in this opinion. Also, whether

there may be factual circumstances that would be actionable under such *legal* theories as tortious interference with contract is beyond the scope of this opinion. (fn10)

II. Division of Fees

Fees generated by the departing attorney while employed by the law firm are accounts receivable owned by the law firm. The departing attorney owes no duty to the law firm with respect to legal fees generated from legal services he performs after leaving the law firm, unless the attorney and the law firm have agreed otherwise, and the fee division is in accordance with Rule 1.5(e), which governs fee-sharing between lawyers not in the same firm.

Because the division of fees would likely not be in proportion to the services performed by each lawyer, Rule 1.5(e) would require each lawyer to assume joint responsibility for the representation by a written agreement with the client. In addition, no matter what arrangements the lawyers make among themselves, the total fee charged to the client must be reasonable under Rule 1.5(a), and the client must be advised of and not object to the participation of all lawyers involved under Rule 1.5(e)(2).

Even if these fee-splitting requirements are complied with, the arrangement may violate public policy if the client is effectively denied choice of counsel in the event the withdrawing lawyer cannot afford to continue to represent the client under the fee-allocation arrangement, and may violate Rule 5.6, which prohibits attorneys from entering into agreements restricting the rights of a lawyer to practice law. (fn11)

Footnotes

1. The comment to Rule 1.14 states: "A client has the right to discharge a lawyer at any time, with or without cause, subject to liability for payment for the lawyer's services."

2. *E.g., Corti v. Fleisher*, 93 Ill. App. 3d 517, 417 N.E.2d 764, 768 (1981); *Dwyer v. Jung*, 133 N.J. Super. 343, 336 A.2d 498, 501 (1975); *see also* ABA/BNA Manual on Professional Conduct 91:705-06; id . 41:710-12.

3. Charles W. Wolfram, *Modern Legal Ethics* 888 (West 1986).

4."A lawyer should hold property of others with the care required of a professional fiduciary." Rule 1.13(a) cmt.; Formal Op. No. 1991-60, Oregon State Bar (a firm must preserve wills and other client property until directed by client to send them elsewhere).

5. Rule 1.14(d): "Upon termination of representation, a lawyer shall take steps to the extent reasonably practicable to protect a client's interests, such as . . . surrendering papers and property to which the client is entitled . . . ."; *see* Formal Op. No. 1991-70, Oregon State Bar (departing attorney may take files for whom he has done work if the clients so request); ABA/BNA Manual on Professional Conduct 91:705.

6. *See* Utah State Bar Ethics Op. No. 91 (May 17, 1989) (an attorney may ethically invoke a retaining lien when the attorney has been wrongfully discharged by the client or withdraws for good cause).

7. Rule 1.14(d) provides: "The lawyer may retain papers relating to the client to the extent permitted by law." There may be portions of the client's file that are not necessary for preserving the client's interests and to which the client is not entitled. It is beyond the scope of this opinion to delineate the limits of Rule 1.14(d). The authorities are not consistent on this issue. *See Corrigan v. Armstrong*, 824 S.W.2d 92 (Mo. App. 1992); Kansas Bar Assoc. Op. 92-05 (July 30, 1992); Connecticut Bar Assoc. Op. 92-21 (July 22, 1992); California State Bar Op. 1992-127, Oregon State Bar Op. 1991-125 (July 1991); Vermont Bar Assoc. Op. 91-3.

8. Oregon Bar Assoc. Formal Op. 1991-70, at n.1, (July 1991).

9. ABA Informal Op. No. 1457 (1980) and ABA Informal Op. 1466 (1981).

10. At least one court has found that the actions of a departing attorney who sent form dismissal agreements urging his previous clients to terminate their arrangements with the former law firm were an "intentional interference with performance of contract by a third person." *Adler, Barish, Daniels, Levin and Creskoff v. Epstein*, 482 Pa. 416, 393 A.2d 1175 (1978). But see id., dissenting opinion, which concludes that the direct solicitation by the departing lawyer had Constitutional protection and was not illegal or unethical. *See also* ABA/BNA Manual of Professional Conduct 91:706-710; Charles C. Marvel, *Annotation, Rights of Attorneys Leaving Firm with Respect to Firm Clients*, 1 A.L.R.4th 1164 (1980).

11. *See Corti*, 417 N.E.2d at 768 (rejecting an agreement under which a law firm performed all legal services on certain matters but was required to turn over all fees received on these matters to a former member of the firm); *Champion v. Superior Court (Boccardo)*, 247 Cal. Rptr. 624 (1988) (California law partnership agreement, under which firm was entitled to receive from withdrawing partner almost all fees he would earn from work performed for partnership's clients, violates "unconscionable fee" provision of DR 2-107 and public policy); *see* generally ABA/BNA Manual of Professional Conduct 91:710-12.

Rules Cited:

1.5

5.6